RECORD AND BRIEFS

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In The
Supreme Court of the United States

JOHN CLELLAN,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Ohio, Franklin County

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Were Petitioner's due process rights violated when a recording that may have recorded events at the scene of the offense after the crime had been committed was lost or destroyed by police and Petitioner does not allege bad faith? Was Petitioner's trial counsel ineffective for not raising this issue at trial and was appellate counsel ineffective for not raising this issue on direct appeal to the Ohio Appellate Court?

2. Was Petitioner's trial counsel ineffective by failing to object when the prosecutor disclosed Petitioner's statement to defense counsel at trial during the state's case-in-chief but prior to Petitioner's testimony?

3. Assuming the trial court incorrectly instructed the jury on the Castle Doctrine, does this improper instruction rise to the level of violating Petitioner's constitutional rights and does this argument raise an important federal question? Was trial counsel ineffective for not objecting to the jury instruction?

4. Should this Court clarify legal terms in a state statute even though such action does not raise an important federal question?

5. Do Ohio's laws deny Petitioner the right to defend himself?

6. Should Petitioner's conviction be overturned because his co-defendant in a joint trial was acquitted?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
OBJECTIONS TO THE JURISDICTION OF THIS COURT	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
A. Background	4
B. Proceedings Below	6
REASONS FOR DENYING THE PETITION	8
I. Petitioner's due process rights were not violated when a recording was lost or destroyed; the lost or destroyed recording could only be characterized as potentially useful evidence, and Petitioner failed to show bad faith on the part of the police in not preserving this recording	8
II. Petitioner has failed to prove that his statement met all three prongs of the *Brady* test; thus, he is unable to show that his trial counsel was ineffective for not objecting when his statement was disclosed to defense counsel during trial	14

TABLE OF CONTENTS – Continued

Page

III. The trial court properly instructed the jury on the Castle Doctrine; assuming this instruction was incorrect, the incorrect instruction does not rise to the level of violating Petitioner's constitutional rights and does not raise an important federal question 19

IV. Federal courts may not review state-court interpretations of state law 22

V. Ohio laws do not deny Petitioner the right to defend himself 22

VI. Inconsistent jury verdicts among multiple defendants in a joint trial do not provide grounds for overturning a jury verdict 23

CONCLUSION 26

APPENDICES

Appendix A: Memorandum Decision of the Court of Appeals of Ohio, Tenth Appellate District, Corrected ¶8 ..... App. 1

Appendix B: Jury instruction regarding the Castle Doctrine under Ohio Revised Code § 2901.05(B) ..... App. 2

TABLE OF AUTHORITIES

Page

CASES

Arizona v. Youngblood, 488 U.S. 51 (1988).....9, 10

Banks v. California, 395 U.S. 708 (1969) 3

Brady v. Maryland, 373 U.S. 83 (1963) .....*passim*

California v. Trombetta, 467 U.S. 479 (1984).....9

Carter v. Bell, 218 F.3d 581 (6th Cir. 2000) 16

Castille v. Peoples, 489 U.S. 346 (1989).....2

Dunn v. United States, 284 U.S. 390 (1932).....23, 24

Estelle v. McGuire, 502 U.S. 62 (1991) 20, 22

Foster v. Ward, 182 F.3d 1177 (10th Cir. 1999) 16

Giglio v. United States, 405 U.S. 150 (1972) 15

Harris v. Rivera, 454 U.S. 339 (1981).....23, 24

Illinois v. Fisher, 540 U.S. 544 (2004) 9, 10, 11

Ransom v. Johnson, 126 F.3d 716 (5th Cir. 1997) 18

Rios-Delgado v. United States, 117 F. Supp. 2d 581 (W.D. Tex. 2000) 18

Rose v. Johnson, 141 F. Supp. 2d 661 (S.D. Tex. 2001) 18

Strickland v. Washington, 466 U.S. 668 (1984).....8, 9

Strickler v. Greene, 527 U.S. 263 (1999) 15

United States v. Acosta, 17 F.3d 538 (2nd Cir. 1994) 24

United States v. Agurs, 427 U.S. 97 (1976).....15

TABLE OF AUTHORITIES – Continued

Page

United States v. Andrews, 850 F.2d 1557 (11th Cir. 1988) 24

United States v. Branch, 537 F.3d 582 (6th Cir. 2008) 10

United States v. Dotterweich, 320 U.S. 277 (1943) 23

United States v. Edwards, 442 F.3d 258 (5th Cir. 2006) 15

United States v. Femia, 9 F.3d 990 (1st Cir. 1993) 11, 12

United States v. Higgs, 713 F.2d 39 (3rd Cir. 1983) 15

United States v. Jobson, 102 F.3d 214 (6th Cir. 1996) 11, 12

United States v. Jumah, 599 F.3d 799 (7th Cir. 2010) 16

United States v. McKinney, 758 F.2d 1036 (5th Cir. 1985) 15

United States v. Parker, 72 F.3d 1444 (10th Cir. 1995) 11, 12

United States v. Powell, 469 U.S. 57 (1984) 23, 24, 25

United States v. Patterson, 348 F.3d 218 (7th Cir. 2003) 24

United States v. Word, 806 F.2d 658 (6th Cir. 1986) 15

TABLE OF AUTHORITIES – Continued

Page

Weatherford v. Bursey, 429 U.S. 545 (1977) 14

Wisconsin v. Mitchell, 508 U.S. 476 (1993).....22

STATUTES

Ohio Revised Code § 2901.05(B) 3, 20, 21

Ohio Revised Code § 2903.21(A) 6

28 U.S.C. § 1254 1

28 U.S.C. § 1257(a).....1, 3

RULES

Ohio Rule of Appellate Procedure 26(B).....2

S.Ct. Prac. R. 2.1(A)(2) 2, 3, 7

S.Ct. Prac. R. 3.6.....3

OPINIONS BELOW

The citation of the unpublished opinion of the Court of Appeals of Ohio, Tenth Appellate District, (Pet. App. A), is *State v. Clellan*, 10th Dist. No. 09AP-1043, 2010 Ohio 3841, 2010 Ohio App. LEXIS 3248. The unpublished entry from the Supreme Court of Ohio declining jurisdiction and dismissing the appeal (Pet. App. C) can be found at the Supreme Court of Ohio's website http://www.sconet.state.oh.us. The unpublished memorandum decision denying Petitioner's application for reopening issued by the Court of Appeals of Ohio, Tenth Appellate District, (Pet. App. B), can be found at the Franklin County Clerk of Courts website http://fcdcfcjs.co.franklin.oh.us/CaseInformationOnline. Enter case no. 09AP1043.

OBJECTIONS TO THE JURISDICTION OF THIS COURT

Petitioner incorrectly claims jurisdiction under 28 U.S.C. § 1254 which provides Sup eme Court review, by way of Writ of Certiorari, of decisions of circuit court of appeals. Because Petitioner is appealing a decision from a state court, the jurisdiction of this Court rests on 28 U.S.C. § 1257. 28 U.S.C. § 1257(a) provides, in pertinent part: "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari[.]"

Petitioner appeals the decision of the Supreme Court of Ohio which declined jurisdiction to hear his case. Pet. App. C. In Petitioner's memorandum in support of jurisdiction to the Supreme Court of Ohio, Petitioner raised new arguments that were not presented on direct appeal to the Court of Appeals of Ohio, Tenth Appellate District. These new arguments are contained in his petition for a writ of certiorari. The arguments Petitioner made in the Ohio Court of Appeals on direct appeal are not in his petition. See Pet. App. A. It is well-established that the presentation of claims for the first time on discretionary review to the state's highest court does not constitute fair presentation for exhaustion purposes. *Castille v. Peoples*, 489 U.S. 346 (1989).

Petitioner is also appealing a memorandum decision of the Court of Appeals of Ohio, Tenth Appellate District, which denied Petitioner's application to reopen his appeal. Pet. App. B. The Ohio Rules of Appellate Procedure, specifically App.R. 26(B), permits applications for reopening an appeal from a judgment of conviction and sentence based upon a claim of ineffective assistance of appellate counsel. Pet. App. B-1. If a defendant's application for reopening is denied, the Rules of Practice of the Supreme Court of Ohio states that a defendant may appeal the decision of the court of appeals to the Supreme Court of Ohio. See S.Ct. Prac. R. 2.1(A)(2) ("an appeal from the decision of a court of appeals under App.R. 26(B) in a noncapital case [ ] may invoke the appellate jurisdiction of the Supreme Court and shall be designated a

claimed appeal of right. In accordance with S.Ct. Prac. R. 3.6, the Supreme Court will determine whether to accept the appeal.") Thus, the decision of the Ohio Court of Appeals denying Petitioner's application for reopening was not a "final judgment . . . rendered by the highest court of a State in which a decision could be had . . . " See 28 U.S.C. § 1257(a); S.Ct. Prac. R. 2.1(A)(2); *Banks v. California*, 395 U.S. 708 (1969).

To invoke the jurisdiction of this court, Petitioner was required to appeal the denial of his application for reopening to the Supreme Court of Ohio in order for the application to be considered a final judgment under 28 U.S.C. § 1257(a). Petitioner failed to do so. Because Petitioner failed to appeal to the Supreme Court of Ohio the decision of the Ohio Court of Appeals denying his application for reopening, the jurisdiction of this Court is not invoked, and this Court should decline to review the petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Ohio Revised Code § 2901.05(B): see Petitioner's Appendix H, but subsection (A)(1) should state (B)(1).

STATEMENT OF THE CASE

A. Background

On February 4, 2009, an argument arose between Petitioner and Robert Litchfield concerning Litchfield's parked car, which partially blocked Petitioner's path to his driveway. Pet. App. A-1. Litchfield was dropping off his brother-in-law's girlfriend, Karen Devine-Riley, at her home. Because of the icy and snowy conditions, Litchfield parked his car partially on the road and partially in Petitioner's driveway. Devine-Riley exited the car in order to unload firewood from the trunk. Pet. App. A-4.

Meanwhile, Petitioner's wife, Joan Clellan, had pulled Petitioner's truck straight into the driveway after returning home. Petitioner preferred the truck to be backed into the driveway, so he went outside to turn the truck around. In order to perform this maneuver, Petitioner pulled his truck past Devine-Riley's driveway, turned the truck around, and then began to back it into his own driveway. In the course of backing, Petitioner came close to Litchfield's parked car. Petitioner stopped his truck so that the front of the truck was almost even with the rear of Litchfield's car, and a verbal altercation ensued. Pet. App. A-4.

Upon stopping his truck, Petitioner began to scream profanities at Devine-Riley. Devine-Riley assured Petitioner they intended to move the car shortly. Pet. App. A-4. Petitioner opened the door of his truck, stood on the floor of the truck between the door and

the cab, and continued to scream and swear at Devine-Riley. Pet. App. A-5.

At that point, Litchfield came to the front of the truck, next to Devine-Riley, and asked, "What the fuck is your problem? Why are you screaming at her?" Petitioner pulled a gun, pointed it at Litchfield, and said, "I'll blow your fucking brains out." Litchfield, who was about four feet away from Petitioner, feared Petitioner would shoot him. He was afraid he was going to die, because Petitioner pointed the gun at Litchfield's head. Litchfield called 911 because Devine-Riley was shaking so badly she could not dial the number. Pet. App. A-5.

Petitioner did not dispute that he "brought the gun up" and said to Litchfield, "Get back. You're going to get shot." Pet. App. A-9. However, Petitioner claimed that he was defending himself. Pet. App. A-10. Petitioner testified that Litchfield offered to "whoop [Petitioner's] ass". Pet. App. A-7 to A-8. After Petitioner grabbed his wife's gun from the console, Litchfield turned and said, "Oh, you pulled a gun on me? Now I will kill you, mother-fucker." Petitioner testified that Litchfield reached through the window of Petitioner's open truck door, and, failing that, began to walk around the truck door. In response, Petitioner brought the gun up and warned Litchfield to get back and that he was going to get shot. Pet. App. A-8.

Deputy Brian Felkner, who responded to the 911 call, testified that Petitioner changed his story about

what occurred. Pet. App. A-5, A-11. Petitioner initially told Felkner that Litchfield tried to pull him out of his vehicle. Petitioner later admitted Litchfield was not pulling him from the vehicle, but only reached into the truck's window. After further inquiry, Petitioner admitted Litchfield did not reach into the vehicle; Petitioner only thought Litchfield would do so. Litchfield also testified that when Petitioner brandished the gun, Litchfield was at the front of the truck, four or five feet from Petitioner. After Petitioner pulled the gun, Litchfield backed away. Litchfield stated that he never touched the truck. Pet. App. A-11.

B. Proceedings Below

Petitioner was charged with aggravated menacing under Ohio Revised Code § 2903.21(A) which alleged that Petitioner "knowingly cause[d] another to believe that [he would] cause serious physical harm to the person or property of the other person." Pet. App. A-5. The jury was instructed on self-defense as a presumption, otherwise known as the Castle Doctrine, and self-defense as an affirmative defense. Pet. App. A-10, A-13. Petitioner was found guilty as charged. Pet. App. A-1.

Petitioner appealed his conviction to the Ohio Court of Appeals, Tenth Appellate District. Pet. App. A. The Ohio Court of Appeals affirmed his conviction. Pet. App. A-18. Petitioner filed a memorandum in support of jurisdiction in the Supreme Court of Ohio. For the first time, the federal questions sought to be

reviewed herein were raised. The Supreme Court of Ohio declined jurisdiction to hear the case and dismissed the appeal as not involving any substantial constitutional question. Pet. App. C.

Petitioner also filed an application to reopen his appeal in the Ohio Court of Appeals alleging ineffective assistance of counsel. In the application, Petitioner raised the first three questions sought to be reviewed in his petition for a Writ of Certiorari. Pet. App. B-2 to B-3. The last three questions in the petition herein were not raised in the application. The Ohio Court of Appeals denied the application for reopening. Pet. App. B. Petitioner did not appeal the decision of the court of appeals denying his application for reopening to the Supreme Court of Ohio as permitted under S.Ct. Prac. R. 2.1(A)(2). Although the decision of the Ohio Court of Appeals denying Petitioner's application was not a final judgment rendered by the highest court of a State which would invoke this Court's jurisdiction, Respondent will proceed to address why this Court should deny the petition for a Writ of Certiorari.

REASONS FOR DENYING THE PETITION

I. Petitioner's due process rights were not violated when a recording was lost or destroyed; the lost or destroyed recording could only be characterized as potentially useful evidence, and Petitioner failed to show bad faith on the part of the police in not preserving this recording.

Petitioner is unable to show that his trial counsel and appellate counsel on direct appeal to the Ohio Court of Appeals were ineffective for not raising the issue of a lost or destroyed police cruiser video recording. The recording may have recorded events at the scene of the offense after the crime already had been committed. Thus, the lost or destroyed recording can only be characterized as potentially useful evidence, and Petitioner is unable to show bad faith on the part of the police in failing to preserve this recording. Thus, Petitioner is unable to show that his counsel's failure to raise this issue at trial or on direct appeal to the Ohio Court of Appeals amounted to ineffective assistance of counsel.

In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court recognized a two-part test for determining whether a criminal defendant was denied the effective assistance of counsel. "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient

performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 687. Unless a defendant makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable. Id.

This Court has held that the Due Process Clause requires the state to disclose material exculpatory evidence to the defense which is in the government's possession. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The *Brady* rule extends to material exculpatory evidence which is lost or destroyed. *California v. Trombetta*, 467 U.S. 479, 489 (1984). To be materially exculpatory, "evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Trombetta*, 467 U.S. at 489. "[W]hen the State suppresses or fails to disclose material exculpatory evidence, the good or bad faith of the prosecution is irrelevant: a due process violation occurs whenever such evidence is withheld." *Illinois v. Fisher*, 540 U.S. 544, 547 (2004), citing *Brady v. Maryland*, 373 U.S. 83 (1963).

However, it is well-established that if the evidence in question is not materially exculpatory, but only potentially useful, the defendant must show bad faith on the part of the state in order to demonstrate a due process violation. *Arizona v. Youngblood*, 488 U.S. 51, 57-58 (1988). "[U]nless a criminal defendant

can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." Id. at 58. Evidence is potentially useful if "no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." Id. at 57.

The existence of a pending discovery request does not eliminate the necessity of showing bad faith on the part of police. *Illinois v. Fisher*, 540 U.S. 544, 548 (2004). Furthermore, negligence, even gross negligence, on the part of the government in failing to preserve potentially useful evidence does not constitute bad faith. *Youngblood*, 488 U.S. at 58; *United States v. Branch*, 537 F.3d 582, 590 (6th Cir. 2008).

In *Youngblood*, this Court considered the police's failure to preserve blood and semen samples taken from a rape victim. A police criminologist had conducted an initial review of the samples, but the state failed to preserve the samples by refrigeration so that the defendant could conduct his own tests. 488 U.S. at 53-54. This Court found that the evidence was potentially useful, and the defendant did not establish a due process violation because the actions of the police could "at worst be described as negligent." Id. at 58.

The issue again arose in *Illinois v. Fisher*. In *Fisher*, the defendant, who was charged with possession of cocaine, filed a discovery motion requesting all physical evidence, including cocaine, which the state

intended to use at trial. *Fisher*, 540 U.S. at 545. Before the cocaine was provided to the defendant, the defendant failed to appear in court and became a fugitive. Id. When he was captured ten years later, the state reinstated the cocaine possession charges but had, in accordance with established procedures, destroyed the cocaine. Id. at 546. This Court concluded that the cocaine was only potentially useful evidence and that there was no due process violation because the defendant did not allege that the police acted in bad faith. Id. at 547-48.

In situations similar to the case at bar, federal courts, citing to this Court's well-established precedent, have found tape recordings that were destroyed by the state to be potentially useful evidence as opposed to material exculpatory evidence. See *United States v. Parker*, 72 F.3d 1444 (10th Cir. 1995); *United States v. Femia*, 9 F.3d 990 (1st Cir. 1993); *United States v. Jobson*, 102 F.3d 214 (6th Cir. 1996). In *Parker*, a state trooper accidentally erased footage of a traffic stop he conducted. The stop eventually led to a search of the car that uncovered narcotics. Id. at 1448. The Tenth Circuit held that the videotaped evidence was potentially useful evidence and explained, "the only way the erased video tape evidence could be 'apparently' exculpatory is if it demonstrated that the events did not occur as [the trooper] related, that is, that he was lying about the events[.]" Id. at 1452. And, "[w]hether [the trooper] was telling the truth was essentially a question of credibility for the district court." Id. The Tenth Circuit further held

that the defendants failed to demonstrate bad faith on the part of the government in destroying the potentially useful evidence, and mere negligence was not sufficient to establish that the trooper acted in bad faith. Id.

In *Femia*, the First Circuit found that the government's destruction of tape recordings of conversations between the defendant and his alleged coconspirators could only be characterized as potentially exculpatory evidence. Because the tapes were destroyed due to the government's gross negligence, and not bad faith, the defendant was unable to show that his due process rights were violated. Id. at 995. Similarly, the Sixth Circuit in *Jobson* held that the destruction of a radio dispatch tape made during defendant's arrest was potentially exculpatory evidence. Moreover, the Court stated "[w]hile we disapprove of the government's dilatory response to defendant's discovery requests, we cannot say that it acted in bad faith. * * * The tape was erased not as a result of malice, but routine police department policy. Though the government was negligent, perhaps even grossly negligent, in failing to preserve the tape, there is no evidence that it acted in bad faith." Id. at 218.

Like the tapes in the federal cases cited above, the tape recording in this case could only be characterized as potentially useful evidence. Here, a deputy responded to the scene of the offense after the victim of the aggravated menacing charge called the police. Pet. App. A-5. After being arrested, Petitioner made comments to the deputy about his version of events.

Pet. App. A-11, B-3. The deputy's cruiser was equipped with a video camera but the video was not preserved. Pet. App. B-3.

On an application to reopen his appeal filed by Petitioner in the Court of Appeals of Ohio, Tenth Appellate District, the state appellate court reasonably concluded that the evidence was potentially useful since the recording occurred after the crime had been committed. Pet. App. B-4. "Because the video did not capture the activity giving rise to the aggravated menacing charge, but only post-incident police activity on arriving at the scene, it does not address the substance of the charge other than through comments of witnesses who were available for trial." Pet. App. B-3, B-4. Thus, the state appellate court held that Petitioner must show bad faith on the part of the police in order to demonstrate a due process violation. Petitioner did not suggest bad faith. Pet. App. B-4. Additionally, Petitioner does not suggest bad faith in his petition for a writ of certiorari. Furthermore, the deputy testified at trial and was subject to cross-examination regarding the lost recording, and Petitioner testified regarding his version of events.

Because the recording is potentially useful evidence and Petitioner has not shown bad faith on the part of the police in failing to preserve this recording, no due process violation occurred. Therefore, Petitioner cannot show that his trial and appellate counsel were ineffective for not raising this issue at trial or on direct appeal to the Ohio Court of Appeals. Furthermore, Petitioner has failed to show that the

state court decided an important federal question in a way that conflicts with relevant decisions of this Court. For these reasons, this Court should deny Petitioner's Writ of Certiorari.

II. Petitioner has failed to prove that his statement met all three prongs of the *Brady* test; thus, he is unable to show that his trial counsel was ineffective for not objecting when his statement was disclosed to defense counsel during trial.

Petitioner is unable to show that his trial counsel was ineffective for not objecting when the prosecutor, during the testimony of the state's first witness, disclosed to defense counsel a statement made by Petitioner. It is well-settled that there is no general constitutional right to discovery in a criminal case. *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). Nevertheless, certain types of evidence must be disclosed by the prosecution in order to safeguard a defendant's due process rights. This Court held that due process requires the prosecution to disclose evidence favorable to an accused when such evidence is material to guilt or punishment. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Evidence is material if there is a reasonable probability that disclosure of the evidence would have changed the outcome of the proceeding. A reasonable probability means one sufficient to undermine confidence in the outcome. Id.

The prosecutor's duty of disclosure under *Brady* includes evidence which is exculpatory and that which

could be used to impeach government witnesses. *Giglio v. United States*, 405 U.S. 150, 154-55 (1972). Thus, there are three components of a *Brady* violation: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) the evidence must have been suppressed by the state, either willfully or inadvertently; and (3) prejudice must have ensued. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999).

The *Brady* rule applies to "the discovery, *after trial*, of information which had been known to the prosecution but unknown to the defense." [Emphasis added.] *United States v. Agurs*, 427 U.S. 97, 103 (1976). Moreover, federal courts have held that a *Brady* violation does not occur if previously undisclosed evidence is disclosed during trial unless the defendant is prejudiced by the delay in disclosure. *United States v. Word*, 806 F.2d 658, 665 (6th Cir. 1986). See also *United States v. McKinney*, 758 F.2d 1036, 1050 (5th Cir. 1985) ("the inquiry is whether the defendant was prejudiced by the tardy disclosure. If the defendant received the material in time to put it to effective use at trial, his conviction should not be reversed simply because it was not disclosed as early as it might have and, indeed, should have been."); *United States v. Higgs*, 713 F.2d 39, 44 (3rd Cir. 1983) (holding that where *Brady* material merely has impeachment value, disclosure on the day the witness testifies satisfied due process).

The petitioner bears the burden of establishing a *Brady* violation. *United States v. Edwards*, 442 F.3d

258, 267 n.9 (5th Cir. 2006); *Carter v. Bell*, 218 F.3d 581, 601 (6th Cir. 2000); *United States v. Jumah*, 599 F.3d 799, 808-09 (7th Cir. 2010); *Foster v. Ward*, 182 F.3d 1177, 1191 (10th Cir. 1999). Here, Petitioner has not met this burden because he cannot establish that all three prongs of the *Brady* test were met. Under the first prong of *Brady*, the Ohio Court of Appeals could not determine whether Petitioner was prejudiced by the state's failure to produce the statement earlier in the proceedings since the nature of the statement and its content was unknown. App., *infra*, A at ¶8.[1] The first witness the prosecution called to testify in the state's case-in-chief was the victim of the offense. During the victim's testimony, the prosecutor advised the court the following:

> MR. STEINBERG: I just want to put on the record that a long time ago we conducted discovery and my understanding was that we would make copies of everything for defense counsel, and defense counsels been very - both counsels have been very open with us, so we had a conversation about a report, and from our perspective, recopied that or allowed defense counsel to recopy that report. So I think from our perspective, we have nothing left, but I want to put that on the record.

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[1] Petitioner's reproduction of paragraph 8 of the Memorandum Decision of the Court of Appeals of Ohio, Tenth Appellate District, is inaccurate. The correct language is reproduced in Respondent's Appendix, *infra*, A.

> THE COURT: Anything from the defense?
>
> MR. SHERMAN: Well, I think, Your Honor, what he's trying to say, and I – for some reason, they had a statement – purported statement from our clients that we had not gotten until today, through, I'm sure, just either inadvertence or omission, when Steve gave us everything. We got that report today. We're fine. We're not going to make any issue of it. He's been a total gentleman throughout not only the trial portion, but the whole portion. He's a great gentleman, and I have nothing but regard for him as a lawyer.
>
> MR. STEINBERG: Thank you.
>
> MR. SHERMAN: Additionally, I think this got lost in the shuffle.

Tr. 77-78. As shown by the above exchange between the prosecution and defense, the record is unclear as to the nature of Petitioner's statement. Thus, Petitioner cannot show that the evidence was favorable to the accused under the first *Brady* prong.

Under the second *Brady* prong, Petitioner's statement was not suppressed because it was disclosed to the defense during trial, not after trial. Lastly, under the third *Brady* prong, Petitioner has not shown that prejudice ensued by Petitioner's statement being disclosed during trial as opposed to before trial. Petitioner asserts that the statement at issue was a statement Petitioner gave to the deputy wherein Petitioner allegedly stated that the victim did not

reach into Petitioner's vehicle and that Petitioner only thought the victim would do so. However, as previously noted, the record is insufficient to determine the nature of Petitioner's statement.

Assuming the record is sufficient to show that the disputed statement was a statement given by Petitioner to the deputy, Petitioner is unable to show prejudice. The prosecutor disclosed Petitioner's statement to defense counsel prior to the testimony of both the deputy and Petitioner. Thus, Petitioner was aware of the nature of the statement prior to testifying and prior to defense counsel cross-examining the deputy.

In addition, defense counsel's decision not to object when Petitioner's statement was disclosed during trial "falls squarely within the ambit of trial strategy." See, e.g., *Rios-Delgado v. United States*, 117 F. Supp. 2d 581, 589 (W.D. Tex. 2000) ("Generally speaking, a failure to object, standing alone, does not rise to the level of constitutionally deficient performance. In cases where an accused complains that counsel was ineffective because he did not object to something . . . , the courts grant significant deference, as such actions fall squarely within the ambit of trial strategy.") Moreover, "[t]actical and strategical decisions of counsel if based on informed and reasoned practical judgment will not be second-guessed." *Ransom v. Johnson*, 126 F.3d 716, 721 (5th Cir. 1997). Courts will not find ineffective assistance of counsel merely because of a disagreement with counsel's trial strategy. *Rose v. Johnson*, 141 F. Supp. 2d 661, 687 (S.D. Tex. 2001).

Because Petitioner has not met his burden of establishing a *Brady* violation, Petitioner cannot show that his trial counsel was ineffective for not objecting to the disclosure of his statement during trial. Furthermore, Petitioner has failed to show that the state court decided an important federal question in a way that conflicts with relevant decisions of this Court. For these reasons, this Court should deny Petitioner's Writ of Certiorari.

III. The trial court properly instructed the jury on the Castle Doctrine; assuming this instruction was incorrect, the incorrect instruction does not rise to the level of violating Petitioner's constitutional rights and does not raise an important federal question.

The Castle Doctrine instruction that the trial court provided to the jury was not erroneous.[2] Assuming the instruction was incorrect, the erroneous instruction does not rise to the level of a constitutional violation. The jury instruction at issue arises from a state statute that gives a defendant a presumption of self-defense under certain circumstances when using defensive force that is intended or likely to cause

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[2] The jury instruction contained in Petitioner's Appendix, K, does not properly recite the entire Castle Doctrine instruction provided to the jury by the trial court. The entire jury instruction on the Castle Doctrine provided by the trial court is contained in Respondent's Appendix, *infra*, B.

death or great bodily harm to another. See Ohio Revised Code § 2901.05(B), Pet. App. H-2. This state statute is also known as the Castle Doctrine.

Whether a jury instruction under the Castle Doctrine was properly given is a matter of state law and does not raise an important federal question. In the context of federal habeas actions, this Court has held, "the fact that the [jury] instruction was allegedly incorrect under state law is not a basis for habeas relief." *Estelle v. McGuire*, 502 U.S. 62, 71-72 (1991). "[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." Id. at 67-68. Thus, an erroneous jury instruction warrants habeas corpus relief only where the instruction "so infected the entire trial that the resulting conviction violates due process." Id. at 72. "It must be established not merely that the instruction is undesirable, erroneous, or even universally condemned, but that it violated some constitutional right." Id. The jury instruction may not be judged in artificial isolation, but must be considered in the context of the instructions as a whole and the trial record. Id. Additionally, the court must inquire whether there is a reasonable likelihood that the jury had applied the challenged instruction in a way that violates the Constitution. Id.

The Castle Doctrine under Ohio Revised Code § 2901.05(B)(1) provides, in pertinent part, that a

person is presumed to have acted in self defense if the person against whom the defensive force is used is in the process of unlawfully and without privilege to do so entering the vehicle occupied by the person using defensive force. This presumption is a rebuttable presumption and may be rebutted by a preponderance of the evidence. Ohio Revised Code § 2901.05(B)(3).

Petitioner takes issue with the fact that the trial court did not instruct the jury on two circumstances in which a defendant is *not presumed* to have acted in self-defense: (1) when the person against whom force is used has a right to be in the vehicle, and (2) when the person who uses the force is unlawfully in the vehicle. Pet. App. B-5. No evidence was presented that the person against whom force was used had a right to be in Petitioner's vehicle or that Petitioner was unlawfully in the vehicle. Thus, the trial court was not required to instruct on matters which were not applicable to the facts of the case, as correctly noted by the Ohio Court of Appeals. Pet. App. B-5. Consequently, Petitioner's trial counsel did not render ineffective assistance of counsel by not objecting to the trial court's jury instruction on the Castle Doctrine, and his appellate counsel was not ineffective by not raising this issue on direct appeal to the Ohio Court of Appeals. Furthermore, Petitioner has failed to show that the state court decided an important federal question. For these reasons, this Court should deny Petitioner's Writ of Certiorari.

IV. Federal courts may not review state-court interpretations of state law.

Petitioner's argument that this court should grant his petition for a writ of certiorari in order to clarify legal terms under the Castle Doctrine should be rejected. This argument does not involve an important question of federal law. Additionally, in the context of habeas review, this Court has stated that a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States. *Estelle v. McGuire*, 502 U.S. at 67-68. Federal courts may not review state-court interpretations of state law. Id. Also, federal courts are bound by a state court's construction of a state statute. *Wisconsin v. Mitchell*, 508 U.S. 476, 483 (1993). Thus, this Honorable Court should deny Petitioner's Writ of Certiorari.

V. Ohio laws do not deny Petitioner the right to defend himself.

Petitioner's argument that Ohio laws deny him the right to defend himself disregards Ohio's self-defense statutes. At Petitioner's trial, the court gave to the jury both of Petitioner's requested instructions on self-defense. The jury was instructed on self-defense as a presumption and self-defense as an affirmative defense. Pet. App. A-10, A-13. The jury did not find that Petitioner's actions constituted self-defense. The Ohio appellate court reviewed the record and found that there was sufficient evidence to sustain Petitioner's conviction for aggravated menacing.

Pet. App. A-6. The appellate court also found that the jury did not lose its way when it did not find that Petitioner acted in self-defense. Pet. App. A-14. Thus, this Honorable Court should deny Petitioner's Writ of Certiorari.

VI. Inconsistent jury verdicts among multiple defendants in a joint trial do not provide grounds for overturning a jury verdict.

Petitioner's argument that his conviction for aggravated menacing should be vacated because his co-defendant was acquitted on the same charge disregards a long line of United States Supreme Court precedent which provides that inconsistent verdicts are not subject to reversal merely because they are inconsistent. *Dunn v. United States*, 284 U.S. 390, 393 (1932); *United States v. Dotterweich*, 320 U.S. 277, 279 (1943); *Harris v. Rivera*, 454 U.S. 339, 345-48 (1981); *United States v. Powell*, 469 U.S. 57 (1984). The Equal Protection Clause does not protect against inconsistent verdicts by juries or judges. *Dotterweich*, 320 U.S. at 279; *Harris v. Rivera*, 454 U.S. at 345, 348. Furthermore, verdicts that treat co-defendants in a joint trial inconsistently are not a sufficient reason for setting the verdict aside. *Harris v. Rivera*, 454 U.S. at 345, citing *Dotterweich*, 320 U.S. at 279. Even assuming that a co-defendant's acquittal is logically inconsistent with a defendant's conviction, a defendant, who is found guilty beyond a reasonable doubt after a fair trial, has no constitutional ground

to complain that his co-defendant was acquitted. *Harris v. Rivera*, 454 U.S. at 348.

Federal courts, citing to this Court's well-established law, have upheld inconsistent verdicts against co-defendants rendered by the same jury. See *United States v. Acosta*, 17 F.3d 538, 544-45 (2nd Cir. 1994) ("[e]ven assuming that the verdict against [defendant] was inconsistent with the verdicts as to his codefendants, we find no basis for relief, for it has long been established that inconsistency in jury verdicts of guilty on some counts and not guilty on others is not a ground for reversal of the verdicts of guilty"); *United States v. Patterson*, 348 F.3d 218, 225 (7th Cir. 2003) ("[t]his court has held that the reasoning of *Powell* and *Dunn* applies with equal force to cases where inconsistent verdicts are rendered against co-defendants on conspiracy charges"); *United States v. Andrews*, 850 F.2d 1557, 1561 (11th Cir. 1988) ("[c]onsistent verdicts are unrequired in joint trials for conspiracy: where all but one of the charged conspirators are acquitted, the verdict against the one can stand. The compelling rationale of *Dunn* and its progency [sic], including *Powell*, brings us to this conclusion.")

Moreover, this Court held that review for sufficiency of the evidence provides adequate protection against any problem caused by inconsistent jury verdicts. "[A] criminal defendant already is afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts. This review should not be confused with the problems

caused by inconsistent verdicts. Sufficiency-of-the-evidence review involves assessment by the courts of whether the evidence adduced at trial could support any rational determination of guilt beyond a reasonable doubt." *Powell*, 469 U.S. at 67.

In the case sub judice, the Ohio Court of Appeals reviewed the record and held that Petitioner's conviction for aggravated menacing was supported by sufficient evidence. Pet. App. A-6. Because the law on inconsistent verdicts is well-settled, and Petitioner has not demonstrated that the state court decided an important federal question in a way that conflicts with relevant decisions of this Court, this Honorable Court should deny Petitioner's Writ of Certiorari.

CONCLUSION

Petitioner does not raise important questions of federal law, and Petitioner has not demonstrated that the Ohio Court of Appeals has decided an important question of federal law in a way that conflicts with relevant decisions of this Court. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

The Memorandum Decision of the Court of Appeals of Ohio, Tenth Appellate District, is reproduced in its entirety in Petitioner's Appendix B with the exception that paragraph 8 of the memorandum in Petitioner's Appendix is inaccurate. The correct language is as follows:

{¶8} Defendant also suggests appellate counsel should have raised on appeal the state's failure to produce defendant's post-arrest comments to Detective Felkner. Although defense counsel on page 78 of the trial transcript alluded to a "purported statement from our clients that we had not gotten until today," we are unable to determine the nature of the statement or its content. As a result, we lack a basis to conclude, as defendant argues, that the state's failure to produce the "statement" earlier in the proceedings prejudiced him or probably would have resulted in a different outcome at trial by providing evidence that defendant legitimately brandished a weapon. To the contrary, defendant's own testimony suggested he lacked a legal basis for employing a deadly weapon in the circumstances leading to the charge against him, as defendant acted on his own assumptions about the nature of the danger the circumstances posed.

APPENDIX B

JURY INSTRUCTION REGARDING THE CASTLE DOCTRINE UNDER OHIO REVISED CODE § 2901.05(B)

Self-defense in a residence or vehicle. Defendant claims he acted in self-defense or in defense of another. While the burden of proof is always on the defendant to prove self-defense, the law creates a presumption that the person acted in self-defense in certain circumstances. This means that if you find by a preponderance of the evidence that the following factors are true, you must find that the defendant acted in self-defense and must enter a verdict of not guilty.

A. The defendant used defensive force.

B. That the person against whom the defensive force was used was in the process of unlawfully and without privilege to do so, entering the residence and/or vehicle occupied by the defendant.

Residence means a dwelling in which the person resides either temporarily or permanently or is visiting as a guest.

Dwelling means a building or conveyance of any kind that has a roof over it and is designed to be occupied by people lodging in the building or conveyance at night, regardless of whether the building or conveyance is temporary or permanent or is mobile or immobile, and includes an attached porch and a tent.

Vehicle means a conveyance of any kind, whether or not motorized, which is designed to transport people or property.

Privilege means any immunity, license, or right conferred by law, bestowed by expressed or implied grant, arising out of a status, position, office, relationship, or growing out of necessity.

This presumption is a rebuttable presumption. If the State presents evidence that causes you to believe by a preponderance of the evidence that either of these factors is not true, then this presumption does not apply.

Preponderance of the evidence is the greater weight of the evidence; that is, evidence that you believe because it outweighs or overbalances in your mind the evidence opposed to it. A preponderance means evidence that is more probable, more persuasive, or of greater probative value. It is the quality of the evidence that must be weighed.
